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IN THE

Supreme Court of the United States

October Term, 1968

No. 258

MORRIS H. KRAMER,

Appellant,

v.

UNION FREE SCHOOL DISTRICT NO. 15, RAYMOND S. BARON, JESSE CESTARI, RALPH J. EDSEL, J. GIBSON FRUIN, HARDON DEIXEL, ELLIOT A. NORWALK, and HAROLD S. ROSENFELD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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Question Presented

Should not the District Court's decision and judgment be affirmed where the complaint does not present a substantial Federal question; where the matter is one left by the United States Constitution to the State, and no violation of any federally guaranteed rights and immunities is involved; where the highest State Court has already determined a matter which, in the absence of such a violation of federally guaranteed rights is one purely of State law; where the controversy involved is furthermore, a political controversy resting properly within the ambit of the

legislative function, and therefore not justiciable; and where, finally, previous decisions of the United States Supreme Court have foreclosed the existence of a substantial Federal question.

ARGUMENT

POINT I

The rationale of Section 2012 is exactly the same as that underlying the residence qualification in all elections.

1. This Court has held consistently that residence is a requirement for voting qualification which rests squarely within the legislative power of the states (*Carrington* v. *Rash*, 380 U. S. 89; *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45; *Pope* v. *Williams*, 193 U. S. 621).

2. The rationale of constitutional permissibility of state legislation in this respect is basically of a three-fold nature.[1]

a. The residence requirement is a necessary aid in the indentification of eligible voters, and to avoid double voting.

b. The residence requirement is important for the purpose of avoiding various election abuses such as the use of floaters, mass voting by transients, bringing in people from the outside for the purpose of improperly influencing the outcome of a local vote.

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[1] See *Massachusetts Senate Document No. 823, Legislative Research Council Report*, March 9, 1966; *Residence Requirements For Voting: 10 Years of Change*, W. Ross Yates of Lehigh University, an address prepared for delivery at the 1962 Annual Meeting of the American Political Science Association at Washington, D. C.

c. Most importantly however, the residence requirement serves to assure an intelligently informed electorate.[2] Only residence in a unit will expose a voter to the problems of the unit, the issues of importance to the unit and the candidates. Only residence assures that the voter acquires a stake in the community sufficient to stimulate responsible voting. Only residence will enable the voter to understand the local problems of importance to the unit.

d. Applying these principles to Section 2012, these apply with greatly increased force and necessity to today's school systems. The ever increasing complexity of the many interacting phases of the school system and structure make it extremely difficult for the electorate fully to understand the whys and wherefores of the detailed operations of the school system. The increasing complexity of state aid formulae, the interaction between state aid and school district reorganization, the expansion of knowledge and its influence on the curriculum, on teacher qualifications and on necessary equipment make it doubly important to have a fully informed electorate.

e. As residence in a unit of general governmental nature such as counties, cities, etc., is apt to assure such knowledge of general local problems, issues and candidates, so in a school district of the kind here involved it is vital to make sure that decisions are made by people who have full information about the basic educational issues involved (as distinguished from such peripheral and incidental details as whether or not concerts are given in the school for the inhabitants of the general area and whether or not adult education courses in basket weaving

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[2] Constance E. Smith, *Voting and Election Laws*, N Y. Oceania Publications, Inc., 1960.

or yoga are available). Many communications of school boards and school administrations are sent home to the parents through the pupils and are not broadcast to the general public, so that non-parents of public school pupils invariably will have less information available than such parents. In addition, it is apodictic that those persons, whose properties in the school district are assessed for payment through the local real property tax of the costs of rendering the services to the pupils and parents of the district, will have enough of an interest, through the burden on their pocketbooks, to acquire such information as they may need in order to try to evaluate the operations of the public school system and the reasonableness of expenditures in which they so heavily and directly participate even though they do not have children in the public schools for which this charge is made.

It can be argued of course that some individual citizens may have such an interest, and undoubtedly some of them do, even though they do not either receive such services or directly pay for them. At the same time we are here dealing with the legislative power of the state to legislate in relation to a vital function of the state, reserved to the state by the United States Constitution. It cannot be reasonably denied that limiting the vote on such a special purpose administrative operation to those persons best informed thereon is reasonably calculated to produce the best result that a legislative act can produce, based on the reasonable expectation of the reaction of men as shown by experience over the years.

Since the Legislature has found it desirable and reasonable to include in the franchise, in addition to the parents who actually use the services of the school district, also those who through the real estate tax directly participate

in providing these services,[3] there is, in a great many school districts in this category, a very serious conflict of interest between the parents and the real estate taxpayers which oftentimes, depending on local conditions and circumstances, makes the provision of adequate educational facilities and services most difficult. Such problems which are increasing throughout the state because of the increase of the general tax load (approximately 10% of school district budgets have been voted down during the last school year), should not be increased by adding to the electorate persons who have no direct interest of any kind in the operations of public schools and who cannot therefore be reasonably expected to devote to school problems the very considerable amount of time required for the understanding of the complex problems of today's school district. It is submitted that it is not only reasonable for the Legislature so to do, but that it is vital for the purpose of insuring the integrity of the educative processes in these districts, to the extent that legislative enactments can produce an informed electorate. The amount of money spent on elementary and secondary education today and the tremendous influence of such education on tomorrow's destiny cannot be overestimated. It is for this reason alone that the provisions of Section 2012 should and must be upheld.

3. The position of those "disfranchised" by Section 2012 is exactly the same as the position of the non-resident

[3] The inclusion of the parents in the franchise by the Laws of 1867, Chapter 406, was the result of the abolition, by the same enactment, of the so-called "rate bills" (tuition payments by all parents of public school pupils). It was this Chapter which made the public schools free in fact as well as in name (the "Union *Free* School Act" of 1853 failed to abolish these "rate bills" which were required from 1814 to 1867).

of a community who nevertheless spends a great deal of time in the community. A resident of the State of New Jersey for instance, who works in the City of New York and spends most of his working and recreation time in the City of New York, undoubtedly may have a very deep interest in the school system of the City School District of the City of New York. Events related to such school system may affect him deeply and personally. He may have an abiding interest in educational excellence of the City of New York. He may have unusual qualifications which he could bring to bear in aid of the educational system in the City of New York. Nevertheless, not being a resident, he has no voice, he cannot vote in the New York City school system. (It should here be re-emphasized of course that no one has a vote on school matters in the New York City school system, to which Section 2012 does not apply.)

With the increasing mobility of people throughout the United States, the interest that appellant has in the school system in which he happens to reside but in which he does not participate in any way as a parent or real estate taxpayer, can be no different from the interest that he has in good educational systems in surrounding districts (where he does not reside), in the nearest metropolitan district, (in which he does not reside) or in fact in the school systems of other states. The present vast migration from the South into New York and other northern states makes the interest of New Yorkers in the school systems of Mississippi and Alabama a very strong and vital interest. This does not however mean that a New Yorker can vote in Mississippi or Alabama.

In addition to those persons who reside in one place and work in another place such as the New Jersey resident referred to above who works in New York City, there are hun-

dreds of thousands of people throughout the country who are in a similar position because they are residents of United States Government enclaves, are engaged in navigation, are students at universities and colleges, are inmates of prisons, hospitals and other institutions. There are also those persons who maintain two or more homes. All these persons obviously may be "interested" and perhaps deeply concerned with the general governmental affairs of those places which are not their legal residence—an interest and concern which is identical with that of appellant herein—and yet they cannot vote in any elections in those areas where they spend so much time—simply because they are not residents of such places. If appellant's theories are right, all such persons are invidiously discriminated against by not allowing them to vote in local elections in the place of their major sojourn but in which they do not maintain a legal residence.

Sergeant Carrington for instance who resided in Texas and worked and spent a good part of his time in a neighboring state, undoubtedly may have a deep and abiding interest in local affairs in the state where he works. Yet, being a resident of Texas, he is properly excluded from the franchise in the other state.

4. It is submitted that residence in a general governmental unit, in the same manner and to the same extent as school patronage under Section 2012, constitutes a person as a *member of a community of interest.* This community of interest, in the case of residence in a municipal unit or state is as close as the Legislature can come to assuring an intelligently informed electorate, exposed to the problems, issues and candidates of the general governmental unit, the functions of which cover a great many different and divergent matters.

In the case of the school districts here involved, the community of interest is not so much a geographic community as it is the community of school patrons of which Section 2012 requires a person to be a member in order to qualify for the vote on matters directly affecting only such patrons.

While Judge Weinstein feels that a school district should not be compared to a sewer district—and of course they are worlds apart—the principles underlying the question of voting on the special services involved are exactly the same. A person who does not use the services of the sewer district or who does not directly pay for all or part thereof, can have no constitutionally protected interest in the operations of the district. He may be personally deeply interested in good sanitation in or near his community, and he may be highly knowledgeable in the field of sanitation, but he can have no actual interest in the operations of the district nor, therefore, a constitutional right to vote in the district.

The same is true, of course, of many other types of special purpose administrative units throughout the United States, such as—to use an example more in keeping with the enlightenment provided by school districts—lighting districts. The mere fact that an occasional passer-by may have a strong interest in such lighting, and be incidentally benefited thereby, does not entitle him to vote on the establishment and operations of the district, the vote on which is limited to the persons for whose primary use the services have been established and to those who directly pay for them.

POINT II

Section 2012 is based on a sound rationale essential for the operation of the schools.

In addition to the rationale discussed in Point I above, there is a very cogent basis for maintaining the difference between the voting qualifications used in the general elections for state and general governmental purposes, and those used in school districts.

It has been the consistent policy of the State over the many years to keep party political considerations out of the state school system.

Human nature being what it is, such policy has not always been entirely successful. There have been times in various areas of the state, where a teacher in order to teach had to contribute a part of his or her salary to the coffers of the political party in power at the time. There have been times where the selection of teachers rested with party political bosses and municipal officials. In the City School District of the City of New York this problem has, in part, been met by a statute requiring the maintenance of a board of examiners and the limitation of teaching licenses and appointments to one of the top 3 candidates in competitive examinations. In the rural and suburban areas where party political influences operate largely in different channels, the method of eliminating party political influences from the school system has been Section 2012 which maintains voting qualifications different from those used in general elections. As pointed out in our Motion to Affirm (Point II, B., 2.) this system has served the State's school system well.

It is submitted therefore that such a rational enactment does not invidiously discriminate but rather serves to undergird the educational edifice by eliminating party political conflicts and passions from the school system so far as this can be done through legislation.

POINT III

Errors in the dissent below.

The following comments are offered in relation to certain erroneous statements in the dissenting opinion below.

1. The statement that "the structure of local government mandates that it is the county, towns and villages which bear the responsibility for much of the expense attributable to school district activities" is without foundation in fact, as far as the school districts are concerned which are here involved.

General governmental expenses of counties, towns and villages are caused by the number of people residing therein. The expenses "attributable to school district activities" are borne entirely by the school districts. It is a basic principle of New York State law that municipalities (as distinguished from school districts) have no connection with the State school system. While, historically the school district originally was a subdivision of a town, there are today more than half of New York State school districts located in more than one county, some 60 are located in three counties and about 20 are located in four counties. Education has consistently been held to be a state function as distinguished from municipal functions. Municipalities have no authority to act in the education field. While the Education Law authorizes a county to establish a county vocational and extension board, this function has long since

been taken over by an intermediate organization of school districts, known as the board of cooperative educational services. The last such county board, in Nassau County, has since been replaced by such a cooperative board and while the Nassau County board is still in existence it no longer has any functions connected with or relating to elementary and secondary education. It is our understanding that it only operates schools for firemen which of course is a municipal function (as to community colleges, see below under 8.).

2. The statement inferring that the operation of school districts "influences the price of goods and services" is likewise untenable. We are not aware of any such influence in any of the districts here involved.

3. The statement that assessment and school district tax collection are areas in which school district activities are paid for by municipalities are likewise without foundation in New York State law.

In the districts here involved the assessments (for all purposes) are done by town assessors, and in a few counties by county assessors. These assessments however are not made for school district purposes. The school district of course, in order to avoid duplicate assessment staffs are required by law to utilize municipal assessment rolls. These rolls however would need to be established even if the school districts had their own procedures and staffs. There is no extra cost to the municipalities in this connection. As far as school district tax collection is concerned the same is done by the school districts, except in a few counties where a special county tax act exists. Outside of such special counties, the county enforces uncollected school taxes on behalf of the school districts but fees sufficient to cover the extra expenses of such enforcement are charged against

the school districts involved. Again, the municipality does not carry the burden of school district activities. Even in those counties with special tax acts, penalties and interests on uncollected taxes go to the municipality, rather than to the school district, thus, generally speaking reimbursing the municipality for the costs of collection. Generally speaking such special tax acts try to achieve a saving in tax collecting procedures by combining town, county, school district and special district taxes.

Even if there were a remnant of expense falling upon the municipality, appellant herein, it must be remembered is not disfranchised by Education Law, Section 2012, from voting on any town or county matters or in relation to any other special districts which may be involved in such minute fractions of municipal expenses, if any there be.

4. The statements that appellant is disfranchised on library matters is of no probative value here. Of a total of 728 public libraries and free association libraries in the State of New York, only 117 are established and supported by school districts (some of which do not fall into the category of districts here involved). In the remaining 611 such libraries, there is no vote by school district voters or, practically speaking, by any other voter. These are largely supported by municipalities where the voter has no voice.

5. The statement that school districts are an outlet for the "political energies" and "political action" of the community, is squarely contrary to the well established policy to keep politics strictly divorced from school district matters. The use of public school buildings for general elections, of course, is so traditional that the theoretical ability of voters to pass on this subject must, for all practical purposes be completely discarded.

6. a. The dissent speaks of the loss of appellant's vote in relation to adult education. It must be pointed out that Education Law, Section 1712 makes the offering of adult education courses mandatory at any time that 20 or more persons make application for such instruction (Education Law, Section 1712, subdivision 3). Thus, the offering of such course does not depend on a vote of the qualified voters of the district but on a person desiring a specific course of instruction finding 19 others who also desire the course. This in turn rests on practical considerations which make a course offered for a smaller group than the statutory number impractical for financial reasons.

b. Recreation.

The dissenting opinion states that appellant is disfranchised in this connection also. The General Municipal Law (Section 244-b) and the Executive Law (Section 422), of the State of New York authorize contracts between school districts and municipalities for the provision of various recreational programs and facilities. This is generally the basis for such programs and facilities and since appellant is not disfranchised from voting in the affairs of whatever municipality may be involved, he certainly has not lost whatever rights if any may exist in this respect.[4]

7. The dissenting opinion refers to various non-property taxes levied by counties for educational purposes. There are various statutes authorizing such action by a county. As indicated however appellant has not lost his voice in county affairs and therefore cannot be heard to complain in this respect. It may be stated that only a very

[4] See also Point IV below, in relation to the peripheral and purely incidental nature of such activities, as compared with the central issue here involved.

few counties in the State of New York utilize this procedure.

8. The dissenting opinion also speaks of county or other municipal expenses in relation with community colleges. It must be noted that school districts have nothing whatever to do with community colleges in that school districts are not authorized to operate beyond the twelfth year of instruction. The only exception from this rule is that a school district does have the right to become the local sponsor of a community college. The fact of the matter is however that only 3 school districts in the State have done so and all of these are city school districts, in which the voting qualifications of Section 2012 do not apply (Auburn, Corning and New York City).

9. The dissent also claims that school district operations have a strong impact on fiscal decision of other local governments. We are not aware of any such impact. If there is however, the action of the municipality or other local government is not precluded to appellant who is not defranchised by Education Law, Section 2012 from such vote as he may have in connection with any such other local government or municipality.

10. Judge Weinstein also speaks of the loss of control by appellant over the matter of state and federal aid to education. Again, however, it must be pointed out that, as far as state aid is concerned, the formula for the same is contained in state legislation in connection with which appellant certainly is not in any way disfranchised. The same thing is true as to federal aid, as we indicated in both respects in our Motion to Affirm.

11. The dissent states that Section 2012 disfranchises "clergy, military and others living on tax exempt prop-

erty." This is incorrect in that any such persons who have children attending the public schools or have such a child living with them are qualified to vote if they meet citizenship, residence and majority requirements. Furthermore, where properties are only partially tax exempt, even such disqualification would not apply. A statement is also made that parents whose children "attend special public schools outside the district" are disqualified. Where a student attends a public school outside of the district under a district contract, it has been held that such outside school by virtue of the contract, becomes a school "of the district." Hence the disqualification does not apply in such cases.

12. Reference is made, for some reason, to "decentralization," which, it is submitted has nothing to do with the subject. Such decentralization refers entirely to the New York City School District which is not here involved. The point in such decentralization, to a large extent, is to reduce the operating unit from 1,100,000 pupils to a number of pupils not much in excess of 25,000 to 30,000 pupils. No district outside of the City School District of the City of New York even approaches such pupil population figure.

13. The dissent also states that it was only the *lower* New York Courts that have held that Section 2012 does not violate the State Constitution. The fact of the matter is that the Court of Appeals, the State's highest Court, made its decision in this matter, affirming the lower Courts.

See our Motion to Affirm (Point I, B., 2, p. 24 and Appendix C).

14. It is submitted therefore that any statements in the dissenting opinion below relating to the above points, must be discounted.

POINT IV

The dissent relies too heavily on peripheral matters.

Such matters as recreation, the use of school buildings for concerts and other community activities are merely incidental to the operations of the State's education system.

They do not go to the heart of the processes here involved, nor is there any reason why such programs necessarily have to be offered through the public school system. There are many areas where such services are rendered through other municipal units as well as through private interested groups, institutions and clubs.

The provision of elementary and secondary education, on the other hand, does go to the very heart of the life of our body politic. It is the very importance of this basic process that makes it so essential that the group of people controlling this process through the vote be carefully defined and limited. It is for this very reason that it is so essential that only those persons who may reasonably be expected to *have* the necessary knowledge and information and those who may reasonably be expected to have a strong enough interest, *i.e.*, through their pocketbook, to *acquire* such knowledge and information, be given the franchise.

While those persons outside the community of school patrons may or may not have a sufficient interest, may or may not be knowledgeable and may or may not be able and willing to devote the very considerable amount of time necessary to acquire such knowledge and information, the Legislature, in the reasonable performance of its constitutional functions must be given the necessary leeway to determine that, based on sound reason and the common experience of life, the paramount interests of the education

system will best be served by a limitation of the franchise to the community of school patrons.

It is obvious of course that the wisdom of such a course of action may be the subject of disagreement among reasonable men.

This Court however is not called upon to decide matters of discretion, of legislative wisdom or of desirability of legislation.

The Courts below have properly held that the statute in question does not invidiously discriminate and is therefore constitutionally unobjectionable. This is reinforced by a decision of the State's highest Court, to the same effect.

POINT V

The so-called "First Amendment issues."

1. The dissent states that Section 2012 discriminates against persons "because of their religious beliefs." This is stated to be so "*solely*" because they chose to send their children to "parochial or other private schools." This statement is self-contradictory because there certainly is no religious discrimination in relation to those hundreds of thousands of people who send their children to private schools which have no religious connections. A further contradiction is also contained in the very statement that this discrimination is based "solely" on the attendance of such pupils at non-public schools. This, of course, is not the point. There probably are people who would like to send their children to the public schools but consider non-public schools preferable for a variety of reasons. Again, however, this is merely a peripheral or tangential consideration as well as purely speculative. The point is that these people are not members of the community of school

patrons. They neither pay for such services nor do they accept them. These people are disfranchised not by the statute, but by their own choice of a different community of interest which choice of course is open to them.

2. The dissent contains a statement to the effect that "the effective power of non-voters in an important mode of expression and association" is limited.

Even where First Amendment freedoms are involved, this Court has held that "a compelling interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms" (*NAACP* v. *Button*, 371 U. S. 415, 438).

It is respectfully submitted, however, that there is no reason whatsoever that appellant and others like him cannot offer any advice or comment they wish to make to a local board of education or to the local public school administration. There is furthermore no reason why appellant, if indeed he were so interested in public education as he claims, could not offer his services on one of the many citizens committees which traditionally work with local boards of education and from which such boards derive great help and assistance. There is no reason whatever why members of such committees must be qualified to vote in the district. On the contrary, to the extent that a board of education is able to do so, it customarily brings in any knowledgeable person on whatever the subject of the committee may be, even without referring to the residence of such persons inside or outside of the district. Thus any claim that appellant's freedom of expression or association has been limited, is wholly untenable.

POINT VI

Reductio ad absurdum.

The absolute rule contended for by the appellant would require completely absurd results.

Appellant relies heavily on a statement from *Harper* (383 U. S. 664):

> "for it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."

If this passage were to state the absolute rule—and appellant does claim that he has the *right, under the United States Constitution,* to vote in school district affairs—then obviously, if such an absolute right were to exist, the laws as applicable in the so-called "Big 6" city school districts to the effect that no one votes on school matters of any kind, would be clearly in violation of the Equal Protection Clause.

In addition if such were the absolute rule, in city school districts of less than 125,000 population, the voters could not be limited, as the New York State Education Law does, to a very small number of matters such as an increase in the Constitutional Tax and Debt Limitation, to election of board members in the 51 city school districts where such members are elected rather than appointed, and to the larger bond issues (where the approval is not of the expenditure of funds but merely of the bond resolution first adopted by the board of education).

Such absolute rule would likewise eliminate the possibility of appointed boards of education. There are only 9 such boards of education in the state while in the more than 800 other school districts, school boards are elected.

Such absolute rule would likewise prohibit the limitation of the powers of the voters to a vote on matters other than teacher's salaries and the group of items known as "ordinary contingent expenses." All these historic dispositions of the structure of the New York State Education System would need to fall, if such absolute rule were to obtain.

It is our position of course that the limitation of the franchise to the community of school patrons does not constitute any kind of discrimination, much less an invidious one.

POINT VII

The equities.

As pointed out in our Motion to Affirm (Point II., D.), it is submitted that the Court must weigh the use of the extraordinary remedy of injunction against the enforcement of a state statute, in the light of a comparison between the non-existing "rights" of a person who has no interest whatever in the operations of this special purpose administrative unit, and the results upon the New York State Education System which the granting of this extraordinary remedy of injunction would engender.

As was pointed out in our Motion to Affirm (Point I., B., 2.) the State Courts have held consistently that the New York State constitutional provision relating to voting qualifications (Article II., Section I.) does not apply to the New York State school districts.

Consequently, if Section 2012 were to be invalidated, in the absence of any state law providing alternative provisions for voting qualifications in school districts, the school system would necessarily come to a grinding halt. Between the date of any such invalidation by the Court and the time that the New York State Legislature can,

and does, provide the missing link in school district voting qualifications, no school district meeting or election could be held. In this connection it is of course vital to understand that in this State there is no connection between school district boundaries and municipal boundaries which in turn include general election district boundaries. Even if the general election voting qualifications did apply—which, as indicated, is not the case in New York—there would be no general election registers or records of voters as they relate to school district boundaries and it would be impossible from the existing municipal registers to determine which school district voters are and which are not residents of the school district.

There will be innumerable cases, during such period, where emergency meetings of district voters must be held. This may be in connection with school district reorganizations, school building construction proposals and many other matters where immediate action is necessary. This means that State legislation would necessarily be required to implement any such decision. Until such legislation is enacted, no school district meeting or election could be held, no matter how urgent the need therefore may be.

It is submitted that such a comparison must lead to the conclusion that such injury to the state school system could not possibly be justified by such non-existing interest of appellant.

Conclusion

Appellees beg leave to incorporate the extensive arguments (with authorities, statutes and appendices) contained in their Motion to Affirm, together with the opinions of Judges Zavatt, Lumbard, Moore and Bartels, as part of this brief.

It is respectfully submitted that the statute under attack herein does not invidiously discriminate against appellant; that the Federal Question is not substantial; that the requirement of membership in the community of school patrons as a required voting qualification in this special purpose administrative unit is as well within the constitutional power of state legislation as the general requirement of residence as such qualification, and is, in fact, not justiciable; that previous decisions of this Court sustain the position of appellees; and that, therefore, the judgment below should be affirmed and the appeal herein dismissed.

Respectfully submitted,

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